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8 Attorneys for Plaintiff, Will Loomis

9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA**

11
12 WILL LOOMIS, an individual,

13
14 Plaintiff,

15 v.

16 JESSICA CORNISH, P/K/A JESSIE
17 J, an individual; UNIVERSAL
18 MUSIC GROUP, INC., a Delaware
19 corporation; LAVA RECORDS LLC, a
20 limited liability company;
21 UNIVERSAL REPUBLIC RECORDS,
22 business form unknown; and DOES
23 1-10 INCLUSIVE,

24
25 Defendants.

Case No. CV12-5525 RSWL
(JEMx)

Hon. Ronald S.W. Lew

**DECLARATION OF DR. DAVID
STERN IN SUPPORT OF
OPPOSITION TO MOTION FOR
SUMMARY JUDGMENT**

Time: 10:00 a.m.
Date: November 5, 2013
Ct rm: 21 -- 5th Floor – Spring
Street

DECLARATION OF DR. DAVID STERN

I, DR. DAVID STERN, declare as follows:

1. I am not a party to this matter. This declaration is based on my personal knowledge, and if called as a witness I could and would competently testify to the matters herein.

2. I am Plaintiff's designated expert and Musicologist pursuant to FRCP 26.

3. I previously filed my written Report of Expert pursuant to FRCP 26(2) on file herein.

4. I respectfully submit this declaration on personal knowledge as to matters stated therein and in support of Plaintiff's opposition to Defendant's motion for summary judgment.

5. There is substantial similarity between the verse melodies of "Bright Red Chords" and "Domino".

6. Melodic differences pointed out by the defense are insufficient to make the verse melodic material of "Domino" truly different melodies from the verse melodic material of "Bright Red Chords".

7. The melodic material of "Bright Red Chords" does not represent common musical expression.

8. The initial eight bars of melodic material of both verses of "Domino" (and the ending of the first verse in bars 18-19) are substantially similar to that of "Bright Red Chords".

9. Eighteen bars of verse material (the first eight bars of both verses and the ending of verse 1) are sufficient material to make a determination of substantial similarity between "Bright Red Chords" and "Domino".

1 10. All verse phrases for the initial eight bars of both verses to
2 “Domino” start out with the same distinct rhythm and pitch content as
3 heard in the opening phrase of “Bright Red Chords”.

4 11. The verse line in “Domino”, “I’m Seeing Hollywood Stars” is the
5 closest to the verse melody of “Bright Red Chords”.

6 12. The verse melody for “Bright Red Chords” and the line of music
7 in “Domino” to the words “I’m seeing Hollywood stars” only contains slight
8 insignificant variations of the same melodic idea. A small flourish at the
9 end of the same melodic phrase does not turn it into a new, original
10 melody.

11 13. “Bright Red Chords” and “Domino” have the same pitch content
12 through the entire first measure of the verse up to the arrival on f#1 on the
13 next downbeat.

14 14. The rhythm of the first measure of Figure A is also the same in
15 both songs, with only one of the smallest possible exceptions, two eighth
16 notes d1 on the fourth beat of bar 10 in “Bright Red Chords” bar and one
17 quarter note d1 on the corresponding fourth beat of “Domino”, bar 4. Both
18 compared songs have the same note (d1) arriving on the fourth beat and
19 occupying its entire duration, all within the same melodic context.

20 15. Both “Bright Red Chords” and “Domino” share in common the
21 f#1 arrived at on the second downbeat of the verse phrase, at times
22 embellished by a lower neighbor note and is not enough of a musical
23 duration or new invention, to render the use of Figure A in “Domino” any
24 further than a variant of Figure A, found in “Bright Red Chords”. This
25 distinction is not significant enough to make a determination that the two
26 compared verses are not substantially similar.

1 16. It is commonplace to make minor changes to melodies that do
2 not constitute changing a melody into a different melody, but simply add
3 some kind of small embellishment or variation to the same melody.

4 17. It is extremely common for there to be such small variants or
5 embellishments of a single melody in the course of singing more than one
6 verse to a song.

7 18. Abstractly defined rhythms and pitches are not protected in
8 copyright. Those same elements do become copyrightable when they are
9 part of a distinct melodic idea.

10 19. At no time have I ever stated that Mr. Loomis's melody is merely
11 common musical expression available for anyone's use and ineligible for
12 copyright protection.

13 20. The melody to "Bright Red Chords" is original and distinct.

14 21. "Out of Sight" starts with a similar melody phrase, but whereas
15 there is no difference in the pitch content in the first bar of Example 4
16 from the Defendants' Expert Witness' Report in "Bright Red Chords" and
17 "Domino", there are two different pitches in "Out of Sight".

18 22. There is no sufficient musical relationship between the opening
19 phrases in Example 4 song "Fire" that would support a classification of the
20 variants of just one single melody. This melodic phrase sits almost
21 entirely on just one note and has a different rhythm from the first melodic
22 phrase of "Bright Red Chords".

23 23. The final melody of Example 4, "It Must Be Magic" is in minor.
24 "Bright Red Chords" is in major.

25 24. The scale degrees in "It Must Be Magic" are different (oscillating
26 between 5 and natural 7 rather than 6-1). There are differences in
27 rhythm, intervals and melodic direction.

